INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Argument I	4
Argument II	5
Argument III	6
Argument IV	6
Conclusion	8
Appendix A—Order of United States District Court dated May 8, 1972	A-1
Appendix B—Judgment of United States District Court dated April 12, 1972	A-2
Appendix C—Motion and Offer of Proof to Support the Motion for New Trial of Melvin Leroy Tyler in Cause No. 70C 588(1)	A-3
Appendix D—Motion of Plaintiff Melvin Leroy Tyler for New Trial in Cause No. 70C 588(1)	A-8
Appendix E—Civil Rights Suit for Injunctive Relief and Damages All in Forma Pauperis Action of Billy Joe Tyler, 09920, and Melvin Leroy Tyler, 09670	A-10

CITATIONS

Cases

Ex Parte Sackett (1935, CA 9th Cal.), 74 F.2d 922	5
Maloney v. E. I. DuPont de Nemours & Co., 396 F.2d 939, 130 U.S. App. D.C. 58, cert. den. 90 S.Ct. 585,	

396 U.S. 1030, 24 L.Ed. 2d 525, rehearing denied 90 S.Ct. 936, 397 U.S. 930, 25 L.Ed. 2d 112 4

Mattox v. United States, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 6,7

McDonald v. Pless, 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300 6

Southern Pacific Co. v. Klinge (CCA 10th, 1933), 65 F.2d 85 7

State v. Tyler, 454 S.W. 2d 564 (Mo. Sup. 1970) 5

Tyler v. Parks, No. 71-6594, cert. den. 41 LW 3185 ... 5

Tyler v. Officers Parks and Plaisted, 331 F. Supp. 260, cert. 4

Tyler v. Peterson, 315 F.Supp. 338 (D.C. Mo. 1970)... 5

Tyler v. Swenson, 440 F.2d 621 (8th Cir. 1971) 5

United States ex rel. Touhy v. Ragen, 340 U.S. 462, 95 L.Ed. 417 5

Williams v. Field (C.A. Cal. 1968), 394 F.2d 329, cert. denied 89 S.Ct. 213, 393 U.S. 891, 21 L.E. 2d 171 4

Rules

Sup. Ct. Rule 19 2

IN THE

SUPREME COURT OF THE UNITED STATES

No. 72-5368

MELVIN LEROY TYLER,
Petitioner,

v.

ALPHONZO LARK, Warden, et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The orders of the United States Court of Appeals for the Eighth Circuit (Misc. 987), dated June 5, 1972, and June 20, 1972, appended to petitioner's petition for a Writ of Certiorari are true copies of the order of that Court.

The order of the United States District Court, Eastern District of Missouri, Eastern Division, dated May 8, 1972, is attached as Appendix A.

JURISDICTION

Jurisdiction is alleged to be based on U. S. Sup. Ct. Rule 19. Respondent respectfully urges lack of jurisdiction on the grounds that Rule 19(a) is not involved and that an order of the United States Court of Appeals denying a motion for leave to proceed in forma pauperis to appeal a jury verdict for defendants in a civil rights action is not in conflict with decisions of other Courts of Appeals or this Court; that no important question of federal law has been decided and that the Court of Appeals has not departed from the accepted and usual course of judicial proceedings.

QUESTIONS PRESENTED

I

Should this Court grant certiorari allowing petitioner the privilege of appealing a jury verdict against petitioner in forma pauperis when the United States District Court has certified that the attempted appeal is frivolous?

II

Should this Court grant certiorari on the issue of the District Court's refusal to allow an agent of the Federal Bureau of Investigation to produce statements of defendants pursuant to a subpoena duces tecum when the agent claimed immunity.

III

Should a statement of an unnamed juror made to another person that the juror had heard that plaintiff in a Civil Rights action was a radical and troublemaker be sufficient to show juror misconduct.

IV

Should petitioner be granted a new trial on the grounds that during one of the recesses defendant Zachary informed a juror that they had worked together and the juror, then realizing such was the case, reported that fact to the Court and the Court offered to excuse the juror based on an agreement before trial that less than six jurors could reach a verdict.

STATEMENT OF THE CASE

Plaintiff filed a complaint based on 42 U.S.C. 1983 alleging a conspiracy among Warden Lark and jail guards to beat him while he was an inmate of the St. Louis City Jail. The Court appointed an attorney for petitioner and the cause was tried to a jury on April 10, 11, and 12, 1972. In accordance with the jury verdict, judgment was rendered for the defendants (Appendix B).

Petitioner Tyler filed his after trial motions. On May 8, 1972, the United States District Court entered an order denying petitioner the privilege of appealing in forma pauperis on the grounds that the appeal was frivolous (Appendix A). Petitioner Tyler's motion for a new trial is contained in Appendix C. Relative portions of his attorney's motion for a new trial is contained in Appendix D.

The United States Court of Appeals for the Eighth Circuit on June 5, 1972, denied petitioner's motion to appeal in forma pauperis for the reason that it was denied by the District Court, and the Court further denied the appeal in forma pauperis after an independent examination of the file. And thereafter on June 20, 1972, the Court denied a rehearing or transfer to the Court en banc.

ARGUMENT

I

Should This Court Grant Certiorari Allowing Petitioner the Privilege of Appealing a Jury Verdict Against Petitioner In Forma Pauperis When the United States District Court Has Certified That the Attempted Appeal Is Frivolous?

The United States District Court, by its order dated May 8, 1972 (Appendix A), certified that the attempted appeal is frivolous. Under such circumstances, petitioner bears the burden in a civil case to persuade the Court to show otherwise. **Maloney v. E. I. DuPont de Nemours & Co.**, 396 F.2d 939, 130 U.S. App. D.C. 58, cert. den. 90 S.Ct. 585, 396 U.S. 1030, 24 L.Ed. 2d 525, rehearing denied 90 S.Ct. 936, 397 U.S. 930, 25 L.Ed. 2d 112. See also **Williams v. Field** (C.A. Cal. 1968), 394 F.2d 329, cert. denied 89 S.Ct. 213, 393 U.S. 891, 21 L.E. 2d 171, in which it was held that only in exceptional circumstances may a petition be filed in forma pauperis. In the instant case, at the expense of the government, petitioner was allowed the privilege of a full scale trial lasting three days before a jury which returned a verdict for the defendant Warden and his guards. And in the **Williams** case, it was held that the trial judge has especially broad discretion in a suit by a prisoner against his jailers. It further held that the Court may refer to its own records and files in determining whether a complaint may be filed in forma pauperis.

In the instant case the District Court certified that petitioner's witnesses were unbelievable insofar as supporting the cause of action. It further took into consideration other lawsuits filed by petitioner. The Court is invited to see other actions wherein petitioner was alleged to have been beaten by his custodians. **Tyler v. Officers Parks and Plaisted**, 331 F. Supp. 260, cert.

Petitioner always alleges that someone committed perjury in his trial. See **Tyler v. Officer Parks and Plaisted,** 31 L.Ed. 2d 483. Petitioner is a prolific plaintiff. See **State v. Tyler,** 454 S.W. 2d 564 (Mo.Supp. 1970); **Tyler v. Swenson,** 440 F.2d 621 (8th Cir. 1971); **Tyler v. Peterson,** 315 F.Supp. 338 (D.C. Mo. 1970); and **Tyler v. Parks,** No. 71-6594, cert. den. 41 LW 3185. It is submitted to this Court that the cases and appeals filed by Tyler show a pattern of an abuse of the judicial system at the government's expense and therefore a writ of certiorari should not issue. For example, a new case involving one of the issues in this case relating to a United States Attorney's actions was filed on November 2, 1972, in the United States District Court captioned **Billy Joe Tyler and Melvin Leroy Tyler v. Kitchen, et al.,** Cause 72C 692(2), which is attached as Appendix E. The City of St. Louis is asking this Court to put a stop to this waste of time and money.

II

Should This Court Grant Certiorari on the Issue of the District Court's Refusal to Allow an Agent of the Federal Bureau of Investigation to Produce Statements of Defendants Pursuant to a Subpoena Duces Tecum When the Agent Claimed Immunity.

A subpoena duces tecum was served upon an agent of the Federal Bureau of Investigation. At the trial the agent claimed immunity under a regulation of the Attorney General. Allegedly, this report contained statements that were helpful to petitioner as admissions of the defendants.

Such immunity has been upheld by this Court in **United States ex rel. Touhy v. Ragen,** 340 U.S. 462, 95 L.Ed. 417. It was held that a regulation of the Attorney General prohibiting agents of the F.B.I. to produce records is a valid rule. See also **Ex parte Sackett** (1935, CA 9th Cal.), 74 F.2d 922, which held a similar regulation valid.

III

Should a Statement of an Unnamed Juror Made to Another Person That the Juror Had Heard That Plaintiff in a Civil Rights Action Was a Radical and Troublemaker Be Sufficient to Show Juror Misconduct.

Petition alleges that one Robert Franklin had a talk with one of the jurors after the trial and he said that he had heard that Tyler was a troublemaker and that he was a radical and that he thought that convicts had no rights. Assuming this all to be true, there is no indication that such information was found out by this unnamed juror before, during, or after the trial. It has been held in **McDonald v. Pless**, 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300, that a juror cannot impeach his own verdict. And a motion for a new trial for juror misconduct which has been ruled upon will not be disturbed by an appellate court except where there is an abuse of discretion. **Mattox v. United States**, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917; **Southern Pacific Co. v. Klinge** (CCA 10th, 1933), 65 F.2d 85. It is submitted to this Court that a statement of a person as to what a juror said after the trial, assuming it was said, is not sufficient grounds to impeach a jury verdict.

IV

Should Petitioner Be Granted a New Trial on the Grounds That During One of the Recesses Defendant Zachary Informed a Juror That They Had Worked Together and the Juror, Then Realizing Such Was the Case, Reported That Fact to the Court and the Court Offered to Excuse the Juror Based on an Agreement Before Trial That Less Than Six Jurors Could Reach a Verdict.

If a transcript were produced it would show that petitioner Tyler agreed to a six-man jury and further agreed

that if during the course of the Trial a juror was excused, less than six jurors could return a verdict. If a transcript were produced it would show that petitioner was refused a mistrial regarding the conversation defendant Zachary had with juror Hartwig. That conversation was that Zachary told juror Hartwig that they had worked for the same company some years ago. The Court offered to excuse juror Hartwig but such was refused by Tyler.

A motion for a new trial on misconduct of a juror is addressed to the discretion of the Court. **Mattox v. United States**, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917. A denial of a motion for a new trial will not be disturbed by an appellate court unless the trial court has abused its discretion. **Southern Pacific Co. v. Klinge** (CCA 10th, 1933), 65 F.2d 85.

The motion for a new trial by Tyler's attorney, paragraph 11 (Appendix D) states that the conversation was not improper but juror Hartwig's disclosure to fellow jurors that she and defendant Zachary worked in the same large store gave the other jurors the impression that Zachary had little money. It is submitted that the Court did not abuse its discretion in not granting a new trial for if the transcript were filed, it would show that **Zachary was granted a directed verdict at the close of plaintiff's case.**

CONCLUSION

It is respectfully submitted that the District Court's action in denying petitioner the privilege of proceeding with an appeal in forma pauperis, as affirmed by the United States Court of Appeals, should be sustained because the proposed appeal is frivolous on all the issues raised.

Respectfully submitted

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APPENDIX A

United States District Court
Eastern District of Missouri
Eastern Division

Melvin Leroy Tyler,
Plaintiff,

vs.

Warden Lark, et al.,
Defendants.

No. 70 C 588 (1)

Order

This matter is pending on motion of the plaintiff to appeal in forma pauperis and for the Court to order payment of a transcript, docket fees, etc. The plaintiff in this cause is an inmate of the penitentiary at Jefferson City, Missouri, and this case is one of many lawsuits filed by the plaintiff which have been tried in the district courts here. The trial of this case required the transportation of a number of prisoners from the state prison at Jefferson City to St. Louis; the testimony of these witnesses was unbelievable insofar as supporting defendant's cause of action. The case was tried before a jury for three days and the jury properly found a verdict for the defendants. To permit plaintiff to appeal in forma pauperis would be a frivolous matter. Additionally, there is no provision in the statutes to pay for transcripts in such a case. Accordingly,

It Is Hereby Ordered that the notice of appeal is permitted to be filed without payment of costs, but the motion to appeal in forma pauperis is denied.

Dated this 8th day of May, 1972.

/s/ James H. Meredith
United States District Judge

APPENDIX B

United States District Court
Eastern District of Missouri
Eastern Division

Melvin Leroy Tyler,
Plaintiff,

vs.

Warden Lark, Warden of the St. Louis City Jail, Joseph C. Gunnell, Director of Welfare, City of St. Louis, Guard Officer Walter Young, Guard Steve Reeves, Guard Robert Perkins, Guard Willie Zachary, and Guard Fay Short,
Defendants.

Case 70 C 588(1)

Judgment

This action came on for trial before the Court and a jury, Honorable James H. Meredith, District Judge, presiding, and the issues having been duly tried and the jury having rendered its verdicts.

It is Ordered and Adjudged that the plaintiff take nothing by his cause of action, and that the action be dismissed on the merits.

Dated at St. Louis, Missouri, this 12th day of April, 1972.

Leo C. DeVoto, Jr.
Clerk of Court
By Robert N. Nousman
Deputy Clerk

APPENDIX C

In the United States District Court for the
Eastern Division, Eastern District
St. Louis

Melvin Leroy Tyer, Plaintiff,
vs.
Warden Lark, et al., Defendants.
Cause No. 70 C 588 (1)

Trial Held April 10, 11, 12, 1972

Motion and Offer of Proof to Support the Motion for New Trial

Comes now Melvin Leroy Tyler, plaintiff herein, and moves this court to hold a hearing before this honorable court, and adjudicate the below listed issues, to-wit:

(a) Hear the testimony of Robert Franklin, telephone number 773-6403 pertaining his conversation with one of the jurors that presided on this instant case and;

(b) Determine to what extent plaintiff was prejudiced, and which person inflamed the jury with prejudicial hearsay assigned as an error in the Motion for New Trial, error No. 4.

Wherefore, being fully presented, this court should sustain this motion for good cause shown, and your plaintiff will forever pray.

Melvin Leroy Tyler
Jefferson City, Missouri

In the United States District Court for the
Eastern Division, Eastern District
St. Louis

Melvin Leroy Tyler,
Plaintiff,
vs.
Warden Lark, et al.,
Defendants.
Cause No. 70 C 588 (1)

Trial Held April 10, 11, 12, 1972

Motion for New Trial

Comes now Melvin Leroy Tyler, by propria persona, and informs the court that upon his trial in the above captioned cause a jury returned a verdict in favor of all defendants on April 10, 11, 12, 1972. He now assigns the below matters and reasons as grounds to support a Motion for New Trial pursuant to the "rules provided by Title 28 U.S.C."

1. The verdict of the jury was against the greater weight of the evidence propounded by the plaintiff in this case and cause.

2. It was prejudicial error for the court to exclude from evidence, the testimony of Walter Johnson, an F.B.I. agent. Such evidence would have proven defendants committed perjury. Such evidence would have went to a material issue, and proved that plaintiff did not strike the defendants in the manner testified by them. Such evidence would have proven in toto that defendants evidence was not worthy of belief.

3. It was prejudicial error for the court to deny plaintiff's Pro se Motion for Mistrial during the trial of this matter. Such request was based upon the courts hearing

In Camera, and relative to the female juror who admitted talking to one of the defendants (Zachary). She further admitted that she worked with the said defendant. During the questing of the jury the defendant set silent and did not come forward with his **known** information. It is impossible at this stage of the proceedings to determine just how prejudiced plaintiff was. Before the prejudice could have been corrected with plaintiff exercising one of his privileged strikes; now such a privilege is useless. The plaintiff was prejudiced in the following manner, to-wit:

(a) It is impossible to determine from a yes or no whether the lone juror could be impartial to plaintiff, or whether she would sway the jury to defendants' defense and;

(b) It is impossible to determine from a slient record whether the scheme of Willie Zachary (defendant), did not prejudice the panel of six jurors. It is impossible to determine to what manner, if any, that this lone juror contributed to the verdict of the jury and;

(c) It is a prima facie fact that plaintiff as well as the defendants are guaranteed certain rights afforded by the constitution, and those rights provided impartially, entitle plaintiff to a new trial. Plaintiff cannot safely have a part in the scheme of justice without due process of law.

4. The verdict of the jury was brought about by prejudicial and unfair comments made outside the presence of this court. That is to say, Mr. Robert Franklin had a conversation with one of the jurors at Fabick Tractor Company—the conversation was held either Thursday or Friday, April 13, 14, 72. The juror stated that he "didn't think convicts had any rights," and the jury heard that Melvin Leroy Tyler was a "trouble maker and radical." The defendants in a rude scheme implanted this in the minds of the jury to prejudice them against plaintiff, and

to secure a verdict in their favor. The plaintiff was prejudiced in the following manner, to-wit:

(a) Plaintiff was prejudiced because the constitutional mandate of the fourteenth amendment requires a trial free from prejudices and;

(b) Plaintiff was denied his rights to cross-examination and confrontation of the adverse hearsay, and thus was denied due process of law and;

(c) Plaintiff was denied his rights to compulsory process to rebut the prejudicial hearsay that plaintiff is a trouble maker and radical and;

(d) Plaintiff was denied the right to have the jury consider only the best evidence, and that is the evidence that comes only after both parties have had the right to test by cross-examination, that evidence which causes the verdict. (See Motion for Offer of Proof.)

5. The verdict of the jury was unconstitutional and a New Trial should be awarded because of the Underwood jurors being mixed with the jurors in this instant case. It was impossible to secure a fair jury from the panel submitted. The chances of prejudice is too great and outweigh due process.

6. The court erred when it granted the Direct Verdict to the Defendants Lark and Gunnell. Such evidence presented by plaintiff and the defendant Walter Young sustained plaintiff's charges. The evidence was as follows to-wit:

(a) Warden Lark had a conversation with plaintiff-witness, Mr. Lee Holden Parker. Such conversation required the jury to determine guilt or innocence. The granting of the Direct Verdict of Acquittal was an invasion of the providence of the jury.

(b) Walter Young testified during direct examination that he provided a copy of his report to Mr. Gunnell (de-

fendant), after the incident at the City Jail. It was the plaintiff's evidence that he was not given medical treatment at the City Jail. It was conceded by the defense attorney that there is no doctor at the City Jail in the evening hours. It is the plaintiff's contention both before trial and now, that Mr. Gunnel had a required duty to provide facilities wherein plaintiff could have received medical attention. It was an invasion of the providence of the jury to deny to them the right to determine the facts as presented against defendant Gunnel.

Wherefore, being fully presented, this plaintiff believes that good cause has been shown why the verdict of the jury should be set aside and held for naught, and the case returned for a retrial, and your plaintiff will forever pray.

Melvin Leroy Tyler
Pro Se
Jefferson City, Mo.

Supplement to Motion for New Trial

Comes now Melvin Leroy Tyler, and moves this court to consider with the Motion for New Trial, the below assigned error, to-wit:

1. The verdict of the jury was founded at least in parts by the perjured testimony of Defendant Walter Young. The said witness committed perjury when he testified that he gave medical aid to plaintiff while in the hole. (See Interrogative No. 26 "Supplement".)

2. The testimony of Young, Short, and Reeves was perjured and would have been proven so by the F.B.I. report.

Wherefore, this court should hold a hearing, take evidence and grant a new trial, and your plaintiff will forever pray.

Melvin Leroy Tyler
Pro Se
Jefferson City, Mo.

APPENDIX D

In the United States District Court
Eastern District of Missouri
Eastern Division

Melvin Leroy Tyler,
Plaintiff,
vs.
Warden Lark, et al.,
Defendants.
No. 70C 588 (1).

Motion of Plaintiff Melvin Leroy Tyler for New Trial

Comes now the Plaintiff, Melvin Leroy Tyler, by and through his Court appointed attorney, Norton Y. Beilenson, and moves the Court to grant him a new trial upon all the issues, and incorporates hereat as though fully set forth herein, Plaintiff's "Motion and Offer of Proof to Support the Motion for New Trial" and "Supplement to Motion for New Trial" heretofore filed by Plaintiff, pro se, on or about April 20, 1972, a copy of which is attached hereto, and as further grounds for such Motion, states:

* * * * * * * *

10. The Court erred in refusing to allow F.B.I. agent Walter Johnson to testify since said agent had been subpoeaned by this Court and further since said agent had spoken to the Court appointed attorney for the Plaintiff with regard to said agent's investigation of the entire matter. Said agent admitted to the Court under oath that he had spoken to Court appointed attorney for the Plaintiff and when doing so had the F.B.I. report in front of him and also discussed with Plaintiff's attorney the statements made by the Defendants herein to the agent.

Additionally, it is the Plaintiff's contention that if, in fact, said agent was under orders from the Attorney General of the United States not to testify in this case for any reason whatsoever, any privileged communication was waived by said agent's discussing this case with Plaintiff's attorney. Additionally, there was no evidence other than the verbal testimony of the Assistant U. S. Attorney for the District of St. Louis, Missouri, with regard to an alleged order from the Attorney General of the United States. No written order was shown to the Court or to Plaintiff's attorney. Certainly nothing in this case could bear on national security.

11. That the Court erred in not granting Plaintiff's request for a mis-trial upon learning that Juror Hartwig had a conversation with the Defendant Zachery. Said Juror indicated that she discussed her said conversation with the other Jurors. It is Plaintiff's position on this point that the other Jurors then learned that said Defendant had two jobs, one being in the bakery Department in the store where this particular Juror worked. It is Plaintiff's contention that this biased and prejudiced the Jurors in favor of the Defendants as a whole leaving the Jury with the impression that the Jail guards are not very highly paid. The exclusion of this Juror alone would not have remedied this error.

* * * * * * *

APPENDIX E

In the United States District Court
Eastern District of Missouri
Eastern Division

Civil Rights Sut for Injunctive Relief and Damages All in Forma Pauperis Action

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Billy Joe Tyler, 09920, Melvin Leroy Tyler, 09670, Missouri Penitentiary, Jefferson City, Missouri,
Plaintiffs,

vs.

Charles Kitchen, Graham W. LaBeaume, Public Defenders Office, St. Louis Circuit Court, St. Louis, Missouri,
Defendants.

Cause No. 72C 692(2)

I. Jurisdiction

This court has exclusive jurisdiction pursuant to title 42 U.S.C.A. § 1983 et seq., title 28 U.S.C. §§ 1343, 1915 and section one of the fourteenth amendment to the United States Constitution. Cf. Monroe v. Pape, 365 U.S. 167 (1961). Defendants are both agents by virtue of their titles, Public Defenders. Further, defendant Charles Kitchen was a United States Attorney at the time of this claimed action. See the discussion in Turner ... U.S. ..., S.Ct. (Jan. 19, 1970), wherein agents of the state was discussed, "functioning pursuant to a statewide policy and performing a state function," Moody v. Flowers, 387 U.S.

97, 102; cf. Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 92-95; and see Dusch v. Davis, 387 U.S. 112, 114; Sailors v. Bd. of Educ., 387 U.S. 105, 107.

II. Demand for Jury Trial

Pursuant to Rule 38 of title 28 U.S.C., plaintiffs request a jury trial on all issues raised herein.

III. Under color of law

Defendant Charles Kitchen was at all times acting under color of law as a United States Attorney, and again as Head of the Public Defender Bureau. Defendant LaBeaume also by virtue of being a Public Defender he is an agent of the State and acts under color of the law, and both defendants did so while violating plaintiffs' rights under the fourteenth amendment.

IV. Constitutional issues involved

Plaintiffs state that the fifth, sixth, eighth, ninth, and fourteenth amendments are involved in this law suit.

V. Concise charge

Plaintiff Melvin Leroy Tyler charges that defendant Charles Kitchen acting as a United States Attorney suborned perjury in the case of Tyler v. Lark, No. 70C588(1) and was granted the post of Head of the Public Defender Bureau for doing so. As a result of this plaintiff was denied relief at a Jury Trial, and as a United States attorney he failed to disclose information proving defendants (No. 70C588) committed perjury at the trial of that matter.

Plaintiff Billy Joe Tyler, who recently was granted a new trial, was appointed the defendant LaBeaume as his

counsel. Both defendants in this matter as a result of the action in the federal court are conspiring to deprive plaintiff Billy Tyler of due process of law.

Plaintiff Billy Joe Tyler charges that defendants are wilfully with-holding his court transcripts to prevent plaintiff from filing a civil rights suit against Judge Nangle of the St. Louis Circuit Court for committing perjury at defendants' PCR hearing and causing seven years inordinate delay by such action. On or about July, 1972, defendant LaBeaume asked to view the PCR transcripts to xerox them and send them right back. After numerous letters he has refused to do so.

Plaintiffs charge that both defendants are conspiring and have violated plaintiffs' rights under the eighth amendment "cruel and unusual punishment." Denied them rights to petition their government for redress under the first amendment, and denied each plaintiff the right to due process of law for personal and political gain.

VI. Relief sought

Plaintiffs pray that they be awarded $75,000 dollars for personal, punitive, and compensatory damages, and that the same be taxed against defendants' properties, money, stocks, or bonds; that the United States of America have and recover the cost of this action from defendants.

VII. Injunctive relief sought

Plaintiffs pray that this court enjoin defendants from holding any papers, properties, or effects of plaintiffs complained about herein.

VIII. Extra relief

Since the trial of Lark v. Tyler cost the United States of America about $90,000 dollars, plaintiff prays this

court to make the United States a party to this suit for the misconduct mentioned herein.

/s/ Billy Joe Tyler
/s/ Melvin L. Tyler

State of Missouri } ss.
County of Cole }

Joseph R. Keene
Notary Public

Sworn to before me this: .....

My commission expires October 10, 1973.

forma pauperis affidavit

Plaintiffs both state that they have no money, stocks, or bonds in which to pay any of the cost of this action and that they believe that they have a just claim.

/s/ Billy Joe Tyler
/s/ Melvin L. Tyler

State of Missouri } ss.
County of Cole }

Joseph R. Keene
Notary Public

Sworn to before me this: .....

My commission expires October 10, 1973.